NO. 49085-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

MARSHALL DISNEY,

Appellant.

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# BRIEF OF APPELLANT

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## *ASSIGNMENT OF ERROR*

### *Assignment of Error*

1. The trial court erred when it found the defendant guilty because substantial evidence does not support a finding of no probable cause.

2. The trial court denied the defendant a fair trial when it took judicial notice of adjudicative facts not generally known within the territorial jurisdiction of the trial court nor capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

3. If the state substantially prevails on appeal this court should exercise its discretion and refuse to impose appellant costs.

### *Issues Pertaining to Assignment of Error*

1. Does a trial court err and violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it finds that defendant guilty of malicious prosecution under RCW 9.62.010 when substantial evidence does not support a finding of the essential element of no probable cause?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and does that same trial court violate ER 201 and ER 605, if it takes judicial notice of adjudicative facts not generally known within the territorial jurisdiction of the trial court nor capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned?

3. If the state prevails on appeal should this court exercise its discretion and refuse to impose appellant costs?

## STATEMENT OF THE CASE

### *Factual History*

On November 13, 2015, the defendant Marshall Disney appeared before the Honorable Mike Sullivan, judge of the Pacific County Superior Court, for a hearing on a burglary charge. RP 16-17, 29, 36, 48-49. During this hearing the defendant sat in a chair behind the defense counsel table next to Nancy McAllister, his court-appointed attorney. *Id.* The defendant was in custody at the time. RP 29. During the hearing a corrections officer by the name of Chanel Wirkkala stood about ten feet behind the defendant as court security. *Id.*

About two weeks after the hearing the defendant filled out a complaint with the Pacific County Jail claiming that Ms McCallister had sexually assaulted him during his November 13th court hearing. RP 16-17. Specifically, he stated that during the hearing she had intentionally placed her hand on his inner thigh near his crotch for three or four seconds. *Id.* Based upon this complaint, Pacific County Deputy Randy Wiegardt went to the jail and took a recorded statement from the defendant, during which the defendant repeated his claim. *Id.*

After speaking with the defendant, Deputy Wiegardt interviewed Nancy McCallister. RP 18. Ms McCallister denied that she had touched the defendant during the hearing. *Id.* Deputy Wiegardt then watched the video

of the November 13th hearing. *Id.* According to Deputy Wiegardt he did not see the claimed touching during the hearing. RP 19-20. In addition, Ms Wirkkala stated that she did not see the alleged touching and that had there been any such touching she believes she would have seen it. RP 32-33.

Following his interview with Ms McAllister and review of the hearing video, Deputy Wiegardt returned to the jail and took a second recorded statement from the defendant. RP 23-24. During this second interview Deputy Wiegardt told the defendant that his investigation did not support the defendant's claims. *Id.* The defendant then repeated his allegation, stating that he wanted Ms McCallister prosecuted for sexually assaulting him. *Id.* Deputy Wiegardt also obtained the recordings of two telephone calls during which the defendant spoke disparagingly about Ms McCallister's legal abilities and stated that he did not want her to get away with sexually assaulting him. Trial Exhibit No. 2.

***Procedural History***

By information filed February 19, 2016, the Pacific County Prosecutor charged the defendant Marshall Disney with one count of Malicious Prosecution in violation of RCW 9.62.010. CP 1-2. The defendant subsequently waived his right to a jury and went to trial before the Honorable Mike Sullivan, who is the sole Superior Court judge in Pacific and Wahkiakum Counties and who was the judge at the November 13th hearing.

CP 10, 21-23; RP 3/25/16 3-8; RP 1. During this trial the state called four witnesses: Deputy Wiegardt, Chanel Wirkkala, Nancy McAllister, and Lewis County Prosecutor Jonathan Meyer. RP 15, 27, 35 and 39. The first three witnesses testified to the facts contained in the preceding factual history. *See* Factual History. The fourth witness testified that he reviewed the police reports, witness statements, and recordings in the case, and that in his opinion there was no probable cause to proceed with a charge against Ms McAllister. RP 39-47. In addition, during trial the state played the video of the defendant's November 13th court hearing, as well as the recordings of Deputy Wiegardt's two interviews with the defendant, which the court admitted into evidence by the stipulation of the parties. Trial Exhibits 2 and 3.

Following the close of the state's case the defendant took the stand as the sole witness for the defense. RP 48-65. During his testimony he repeated the allegations he had twice made to Deputy Wiegardt. *Id.* Following his testimony the parties presented their closing arguments and the court took the matter under advisement. RP 66-74. Two days after receiving this testimony the court reconvened, rendered a verdict of guilty, and entered a document entitled "Verdict After Bench Trial." CP 24-28. It states:

> Trial was held before the bench on May 11, 2016. Mark McClain, Pacific County Prosecutor, for the state; Mr. Edward Penoyer for the Defendant, Mr. Disney.
>
> The court observed the witnesses' demeanors, considered their

testimonies, the admitted exhibits and counsels' argument. The court now renders its verdict as follows:

Verdict

The defendant, Marshall Disney, is guilty of Malicious Prosecution, as charged in Count I of the Information.

Summary of Court's Verdict

PROBABL[E] CAUSE

A person's allegation that a crime has been committed is only an allegation which the State mu[st] prove beyond a reasonable doubt. Mr. Marshall Disney, the Defendant, alleged an inappropriate touching of his person (on his inner thigh near his crotch) by his attorney in open court while on the record during a court proceeding. Mr. Disney and his attorney were each seated in a separate chair next to each other.

The defendant's allegation constitutes an Assault Third Degree with Sexual Motivation, a Class C felony, punishable by incarceration up to a maximum of five years.

The corrections officer providing security testified that she would have noticed the attorney's hand move across the space between the Defendant's chair and his attorney's chair. ***The court takes judicial notice that each chair is a non-padded chair with arm rests and a person's body can be seen through the slats of the chair's back and side arm rests.*** The corrections officer testified that she would have noticed if the attorney had reached over and touched the defendant in his inner thigh area near his groin. She testified that this would have been out of the ordinary and, therefore, would have observed it.

The court viewed the video sections played by agreement of counsel. The court observed no obvious movement of the attorney's hand and arm toward the defendant's inner thigh or groin area. The distance shown in the video clip(s) clearly shows a significant space between the attorney's left arm/hand and the defendant's area of his inner thigh/groin. The court finds that if the attorney had done the touching as alleged by the defendant, the attorney's arm and hand would have

had to make a movement toward the defendant's inner thigh that would necessitate a significant movement of the attorney's hand and forearm. No such movement was seen in the video clip(s). The corrections officer also testified similarly.

The Lewis County Prosecutor, Jonathan Meyer, testified that he reviewed all the statements, police reports and video(s). Based upon his many years of criminal law practice a[n]d his hundreds, if not thousands, of decisions he has made in determining whether a person's actions constituted probable cause to charge a crime. Prosecutor Meyer testified that no action or non-action, by the defendant's attorney created any basis for probable cause to be found.

Pacific County Deputy Wiegardt, the investigative officer in this case, interviewed all witnesses, including the defendant's accused attorney. His investigative report was reviewed by the Lewis County Prosecutor who made his own, independent decision that probable cause did not exist to support any allegation of improper touching.

The defendant testified that he is very sensitive to touching based upon past, negative touching experiences by his friends or himself. However, both the corrections officer and Prosecutor Meyer testified that they did not notice any distinct or abrupt movement by the defendant during the court proceeding. Prosecutor Meyer testified that he would expect to see such movement, especially if the defendant was as sensitive to touch as the defendant testified. The court finds that the video clip(s) support these testimonies.

Therefore, the court finds beyond a reasonable doubt that no probabl[e] cause existed to support the defendant's accusation against his attorney.

MALICIOUS ACTS

Now, the court shall decide whether the defendant's actions were malicious. WPIC 2.13 defines Malice – Maliciously: Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

The court will look from the testimony and evidence to determine whether the defendant's actions were malicious.

> The defendant continued to press his allegation to law enforcement agencies after he was told by at least two law enforcement entities that his allegation was not supported by the facts learned during the investigation [here, the court considers the prosecutor from Lewis County as "law enforcement' even though he is independent of any sheriff's office.] The evidence demonstrates that the sheriff's deputy conducted his investigation in a reasonable and professional manner. Further, the Lewis County Prosecutor is independent of the Pacific County Prosecutor. Prosecutor Meyer is elected by registered voters from Lewis, not Pacific County. In other words, Prosecutor Meyer does not answer to any other, elected prosecutor; only to his constituency. Prosecutor Meyer is also bound by both his oath of office and the Washington State Supreme Court to conduct himself accordingly. The court found Prosecutor Meyer's testimony demonstrated a thoughtful and careful examination of all the evidence and an independent conclusion drawn by him from his examination, independent of any other person or entity.
>
> The defendant testified to the effect of "that'll teach her to touch my leg" and "I was being prosecuted for something I didn't do." These statement[s], taken together with all the other evidence demonstrates that defendant's animosity toward the entire system: sheriff's office, prosecutors and even his defense attorney. The defendant was obviously angry at the whole system. That is the defendant's right to think what he will. However, his dislike of what he saw happening to him led him down the path to accuse his attorney of an illegal touching just out of spite. The court finds that the defendant's acts were intentionally done to annoy or vex his attorney without any justifiable basis in fact.
>
> Therefore, the court finds beyond a reasonable doubt that the defendant acted with malice or maliciously toward his attorney in making the allegation of illegal touching by his attorney

CP 24-28 (emphasis added).

The court later entered the following "Findings of Fact, Conclusions of Law and Verdict (additive)" in support of its guilty verdict.

On May 11, 2016, a Bench Trial was held before this court, the

Honorable Judge Michael Sullivan. The Defendant was present, with his attorney, Edward Penoyar. The State was represented by Prosecuting Attorney Mark McClain. The court heard testimony from the State's witness; Pacific County Deputy Sheriff Randy Wiegardt, Defendant's former attorney, Nancy McAllister, Jonathan Meyer, Lewis County Prosecutor, and Chanel Wirkkala, former Pacific County Corrections Officer. The court considered exhibits admitted into evidence. The court heard testimony from the Defendant. This court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1.1 On November 13, 2015 the Defendant in this matter, Marshall Disney, appeared in the Pacific County Superior Court then represented by his public defender, Nancy McAllister.

1.2 During the November 13, 2015 hearing the courtroom was being used for a judicial process, signage was posted in compliance with RCW 2.28.200, as signage was posted notifying the public of possible enhanced penalties, prominently displayed at a public entrance, and was the standard signage developed by the administrative office of the courts.

1.3 Pacific County Deputy Sheriff Randy Wiegardt testified that he investigated a Prison Rape Elimination Act complaint initiated by the Defendant herein, Marshal Disney, alleging that his then attorney, Nancy McAllister, as she was speaking to the judge, reached under the table and rubbed the inside of Disney's leg. Disney asserted this was a sexual touching. Disney completed a Prison Rape Elimination Act (PREA) Reporting Form which was admitted at trial.

1.4 Introduced into evidence was a recording of the interview conducted by Deputy Randy Weigardt of Disney conducted on December 5, 2015 at 1608 hours. The interview was recorded with Disney's permission. Disney asserted "she, [McAllister] slid her hand under the desk and put it on my leg and like rubbed my leg." Disney said it was sexually done. That it made him feel weird because of where she touched him, specifically the inner part of his right leg. Disney asserted this may have been one of "her ploys to butter [him] up" to make him accept a plea deal. He said perhaps she

did it to "truck me off for whatever deal/reason...I mean she is a public defender." Disney said McAllister's hand was on his leg for approximately 3 seconds. Disney asked "a few people in his cell what he should do." Disney asserted the incident occurred on Friday, November 13, 2015 and reported the incident via a PREA reporting form on November 26, 2015. Disney said he was aware that no touching should occur between an attorney or in the courtroom or by any member in the jail, as that was provided to him in the jail guidebook. Disney discussed who should be appointed to his case and indicated that it should be "Hatch or Arcuri, because me and uh Karlsvik have bad blood too."

1.5 On January 14, 2016 Deputy Weigardt again interviewed Disney related to his allegation. This recording was likewise introduced at trial. Deputy Weigardt conducted this interview following his review of the video and evidence in the case and read Disney his Miranda rights. Disney acknowledged his rights and agreed to speak to the Deputy. During the interview Disney again asserted that McAllister did touch him, specifically stating that McAllister "while talking with the judge about [his] case, reached under the table and put her hand on the inside of [his] leg....She touched me on the inside of my leg." Deputy Weigardt inquired to ensure that the touching was done in a sexual manner and Disney said, "...believed she did it purposefully...and that [McAllister] touched [his leg] 3 to 4 inches from his groin area."

1.6 Also admitted into evidence was a video (incorporated herein by reference). The video depicts Disney and his attorney, McAllister, seated at counsel table during the time when Disney reports his attorney touched him under the table. Throughout the majority of the video McAllister's hands, and specifically her left hand which was hand closest to Disney and it does not appear McAllister ever even touched Disney. Further, Disney has no reaction whatsoever while he asserts his attorney is touching is groin area.

1.7 Corrections Officer Wirkkala states that on November 13, 2015 she was on courtroom security detail (which is visible from the video) and did not observe any inappropriate exchange between Disney and McAllister. Wirkkala testified that she would have observed any touching as well as any movement to touch Disney and

did not observe any touch. Wirkkala further reports Disney did not make a disclosure about any touching.

1.8 Also introduced at trial were calls Disney made while in custody related to this matter. During one of the calls Disney states, "I'm just glad I have a real lawyer, not a truck like Nancy," (referring to McAllister) - "that'll teach her to touch my leg." Disney discussed the matter with the caller and Disney acknowledged the question that McAllister 'grabbed his thigh."

1.9 On another telephone call Disney said, "I was molested, for sure...[by] my lawyer."

1.10 Jonathan Meyer, Lewis County Prosecuting Attorney, testified at trial as an expert witness for the state. Meyer, a former defense attorney who is now the elected Prosecutor for Lewis County, is qualified to render an opinion as to whether there was probable cause to establish the offense alleged by Disney. Meyer reviewed the discovery in this matter to include the reported allegations, video, and reports from the Officer.

1.11 Meyer testified there was not probable cause for the offense alleged by Disney. Meyer indicated, specifically, that the absence of evidence, absence of admission to the alleged assault, the absence of a reaction from Disney during this alleged sexual assault, the absence of any observations corroborating witnesses who would have been in a position to observe any sexual assault (including the corrections officer who had the best view), as well as the likely motivation by Disney were among the reason there was not probable cause for the assault allegations made by Disney. Meyer testified that the conduct Disney accused McAllister of conducting would constitute a felony sex offense, specifically third degree assault with sexual motivation.

1.12 Nancy McAllister testified that she did not touch Mr. Disney, especially in a sexual manner. Further, that there had be no touching of Disney's inside thigh or rubbing her hand on Disney in any way. McAllister denied any inappropriate contact whatsoever with Disney.

1.13 McAllister further testified what Disney alleged would constitute a felony sex offense. McAllister based this conclusion on

her personal knowledge, experience as a trial attorney, and observations in this particular courtroom of the courtroom signage notifying the public of possible enhanced penalties, which was prominently displayed at a public entrance, and was the standard signage developed by the administrative office of the courts.

1.14 McAllister further testified that following the hearing conducted on the video, as part of her defense preparation for Disney's pending Burglary matter, she met with Disney and Disney did not refuse to meet with her or raise any issue related to McAllister.

1.15 Deputy Weigardt testified that even after the matter was investigated and closed Disney continue to report the same incident to several law enforcement agencies, including the Washington State Patrol and also further up the Pacific County command staff, including the Pacific County Sheriff.

1.16 Deputy Weigardt also testified that Disney attempted to have other make these allegations for him, including Jaclyn Settlemyer, requesting others to contact the State Patrol, "internal affairs," and other law enforcement entities.

1.17 Disney testified at trial. Disney agreed that he had attempted to report the allegations to several law enforcement agencies even after the matter had been investigated by the Pacific County Sheriff's Office and after receiving a letter (admitted at trial) from the Pacific County Prosecutor's Office that informed Disney that the matter had been referred to another Prosecutor's Office for review and that following their review it was determined that no crime had occurred and the matter was concluded. In addition to the several attempts to report the closed allegations, Disney wrote to the investigating Deputy and The Pacific County Sheriff (letters admitted in evidence). Disney maintained that the allegations were true and that there was no evidence which demonstrated his complaint was untrue. Disney further asserted that he is particularly sensitive to touches, yet there was no reaction to any touch. This court finds Disney's testimony not credible.

1.18 This court finds the state's witnesses credible.

1.19 Disney, with malice and without probable cause, attempted to cause another, specifically Nancy McAllister, to be arrested or proceeded against for a crime for which she was innocent.

II. CONCLUSIONS OF LAW

Based on the foregoing findings:

2.1 The court has jurisdiction over the defendant and the subject matter of this action.

2.2 In Count 1, Mr. Disney is guilty of the crime of Malicious Prosecution as charged in the original information.

CP 31-35.

The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 36-48. 51-65.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT FOUND THE DEFENDANT GUILTY BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING ON THE ESSENTIAL ELEMENT OF NO PROBABLE CAUSE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1. § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id.

"Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App.

545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence "that the defendant was the one who perpetrated the crime." *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar the state charged the defendant with malicious prosecution under RCW 9.62.010. This statute states:

> Every person who shall, maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he or she is innocent:
>
> (1) If such crime be a felony, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years; and
>
> (2) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor.

RCW 9.62.010.

The gravamen of this offense is to (1) "maliciously," (2) "without probable cause," (3) "cause or attempt to cause another to be arrested or proceeded against for any crime," (4) for which the accused person "is

innocent." As the following explains, the essential element of "without probable cause" is missing in this case.

In determining the existence of "probable cause" a trial court does not weigh competing evidence and make a determination on which side of the proposition the court finds more credible or likely. *In re Detention of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002). Rather, in determining probable cause a trial court should assume the correctness of the evidence presented in support of the probable cause finding. *Id.* The Washington State Supreme Court has put this proposition as follows:

> The probable cause standard is familiar to judges as it is used frequently in the Fourth Amendment context. One of the most common examples is the determination of probable cause to issue a search warrant. There the burden is on the State to recite objective facts and circumstances which, if believed, would lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found if a search takes place.
>
> Another common Fourth Amendment example is the determination of probable cause on a warrantless arrest. One way to determine whether a warrantless arrest is "reasonable" is to consider whether the State's evidence, if believed, establishes the officer had reasonable grounds to believe a felony had been or was being committed in his presence.
>
> Probable cause exists if the proposition to be proven has been prima facie shown. As discussed above, the court determines whether the facts (or absence thereof) – *if believed* – warrant more proceedings.

*In re Detention of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002) (citations omitted; emphasis in original).

Put into the context of a charge under RCW 9.62.010, the question then becomes whether or not the defendant's evidence, "if believed" would warrant a determination that the alleged "crime" had occurred. In the case at bar application of this standard leads to the conclusion that the defendant did not make his allegation against his trial attorney "without probable cause." His evidence, which he twice gave to the investigating officer, was that at the November hearing his attorney, without his consent, intentionally placed her hand on his inner thigh near his crotch while he was in court seated at counsel table. He was quite certain that the conduct was intentional and sexual in nature. This evidence, "if believed" was more than sufficient to support the conclusion that it was more likely than not that a crime had occurred. It constituted a *prima facie* case supporting the charge. Thus, in the case at bar, the evidence presented at trial does not support the essential element of "no probable cause."

In this case it is true that the state presented the evidence of Deputy Wiegardt and the Lewis County Prosecutor who both testified that they had reviewed all of the evidence, including the defendant's claims as well as his attorney's protestations to the contrary, and that they came to the conclusion that they did not believe there was probable cause. The trial court also adopted this position. However, as was mentioned above, these conclusions were all given after adopting an incorrect standard of review. They did not

review the defendant's evidence, assume it to be true, and then determine whether or not there was probable cause to believe a crime had been committed. Rather, they considered the competing evidence, weighed it, and made a judgment based upon which evidence they believed and which evidence they did not believe. Thus, their testimony does not constitute substantial evidence on the element of no probable cause. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss.

**II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT TOOK JUDICIAL NOTICE OF ADJUDICATIVE FACTS NOT GENERALLY KNOWN WITHIN THE TERRITORIAL JURISDICTION OF THE TRIAL COURT NOR CAPABLE OF ACCURATE AND READY DETERMINATION BY RESORT TO SOURCES WHOSE ACCURACY CANNOT REASONABLY BE QUESTIONED.**

Under ER 201(b), a judge has the authority, *sua sponte*, to take judicial notice of certain facts. Subsection (b) of this rule states:

> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

ER 201(b).

Under the plain language of this rule, the trial court may not take judicial notice of a disputed fact. For example, in *City of Seattle v. Peterson*, 39 Wn.App. 524, 693 P.2d 757 (1985), a defendant appealed the trial court's

decision that he had committed a speeding infraction, arguing that the trial court had erred when it took judicial notice of the accuracy of the speed measuring device. The Court of Appeals reversed, finding that on the record before it, the City had failed to present any evidence to support its claim that accuracy of the speed measuring device at issue was "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Similarly, in *State v. Duran-Davila*, 77 Wn.App. 701, 705-06, 892 P.2d 1125 (1995), the defendant was convicted of involving a minor in drug dealing following a trial in which the court took judicial notice that the person the defendant involved in drug dealing was under 18-years of age. The court based its ruling upon the court clerk's statement to the judge that she had seen the minor's juvenile court file, which verified that the person was under 18-years of age. The Court of Appeals reversed, finding that the trial court might be able to review its own file and take judicial notice of facts contained therein, but it could not take judicial notice of what a clerk told the judge was in the file.

In the case at bar, the judge took "judicial notice" of the following facts, noted in italics and bold:

> The corrections officer providing security testified that she would have noticed the attorney's hand move across the space between the Defendant's chair and his attorney's chair. ***The court***

> ***takes judicial notice that each chair is a non-padded chair with arm rests and a person's body can be seen through the slats of the chair's back and side arm rests.*** The corrections officer testified that she would have notice if the attorney had reached over and touched the defendant in his inner thigh area near his groin. She testified that this would have been out of the ordinary and, therefore, would have observed it.

CP 25 (emphasis added).

In this case the one disputed fact before the court was whether or not the defendant's attorney placed her hand on the defendant's leg while the two of them were sitting at counsel table during a court hearing. The defendant claimed that it did happen. His attorney denied that it did. A corrections officer standing about 10 feet behind the defendant testified that she believed she would have seen this occur if it had. Thus, as far as the testimony of the corrections officer was concerned, the configuration of the chairs in which defendant and his counsel were sitting would obviously be critical to her ability to see or not see something. The trial judge apparently held this opinion because he chose to put his "judicial notice" in the middle of his evaluation of the corrections officer's testimony. In essence, the trial court stated that he found the corrections officer's testimony credible and accurate because he took judicial notice that the chairs were such that he was certain that she would have been able to see the touching had it occurred.

The problem with court taking judicial notice in this case is that the configuration of the chairs on the day in question, including (1) whether or

not they were padded, (2) whether or not they had arm rests, and most critical, (3) whether or not "a person's body can be seen through the slats of the chair's back and side arm rests," are not facts either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" as they must be for admission under ER 201 as facts that can be judicially noted. Rather, they are facts that must be determined by the trial of facts after competent evidence is presented via testimony or other admissible evidence. In this case neither party presented such evidence. Rather, the court did. In so acting the trial judge violated ER 201 and acted as a witness in the case, also violating ER 605. The rule states:

> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

ER 605.

Teagland notes the following on this point.

> The notion of judicial notice should not be confused with a judge's personal knowledge about facts at issue. A judge may not dispense with the requirement of formal proof simply because he or she already "knows" that something is true. A judge who does so becomes, in effect, a witness in the case — a practice that violates ER 605.

5 Washington Practice, Evidence Law and Practice § 201.3 (6th ed.),

As an evidentiary error in this case the question then becomes whether or not the error was harmless or prejudicial. *Vandercook v. Reece*, 120

Wn.App. 647, 652, 86 P.3d 206, 209 (2004) (Evidentiary error such as the violation of ER 605 is not harmless unless the trial court would necessarily have arrived at the same conclusion without that error.) In the case at bar the error was far from harmless.

As was stated previously, the defendant claimed that his attorney intentionally touched him on the leg during the November 13th hearing and his attorney denied that she did. Given these competing claims, the testimony of the corrections officer and the issue of what she could see because of the physical layout of the chairs and the table was critical to the court's analysis on what this witness could or could not see. The trial court's decision to insert facts upon judicial notice into the middle of this analysis on the corrections officer's testimony supports the conclusion that this evidence was critical to the court. As such, the erroneous admission and consideration of this evidence in violation of ER 201 and ER 605 was not harmless in this case. As a result, the defendant should be granted a new trial.

## III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE APPELLANT COSTS.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A

defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra.* In the case at bar the trial court found Marshall Disney indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

*State v. Nolan*, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a

decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra.* The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis,* to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

Similarly in the case at bar, the defendant is indigent and lacks an

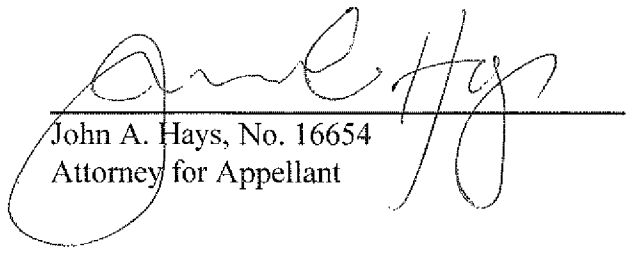
ability to pay. In fact, the defendant is a 27-year-old man with numerous felony convictions and little ability to support himself, let alone pay legal financial obligations. Given the trial court's finding of indigency at the trial level and at the appellate level, it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

## CONCLUSION

This court should vacate the defendant's conviction and remand for dismissal with prejudice because substantial evidence did not support a finding of the essential element of "no probable cause." In the alternative, this court should vacate the defendant's conviction and remand for a new trial based upon the trial court error in taking judicial notice of adjudicative facts in violation of ER 201 and ER 605. Finally, should the state substantially prevail on appeal, appellant requests that this court exercise its discretion and not impose costs on appeal.

DATED this 15th day of September, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

## APPENDIX

### WASHINGTON CONSTITUTION
### ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

### UNITED STATES CONSTITUTION,
### FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

### RCW 9.62.010
### Malicious Prosecution

Every person who shall, maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he or she is innocent:

(1) If such crime be a felony, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years; and

(2) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor.

## ER 201
## Judicial Notice of Adjudicative Facts

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

## ER 605
## Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

| | |
|---|---|
| **STATE OF WASHINGTON,**<br>**Respondent,**<br><br>**vs.**<br><br>**MARSHALL DISNEY,**<br>**Appellant.** | **NO. 49085-4-II**<br><br>**AFFIRMATION OF SERVICE** |

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Mark D. McClain
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   Connell, WA 99326

Dated this 15th day of September, 2016, at Longview, WA.

Diane C. Hays

# HAYS LAW OFFICE

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Court of Appeals Case Number: 49085-4

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